

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**GREGORY WAYNE COLBURN**

**APPELLANT**

**VS.**

**NO. 2014-KA-01368**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>STATEMENT OF THE ISSUES .....</b>	<b>1</b>
<b>STATEMENT OF THE CASE .....</b>	<b>1</b>
<b>STATEMENT OF THE FACTS .....</b>	<b>2</b>
<b>ARGUMENT .....</b>	<b>9</b>
<b>I.    The statute under which Colburn was convicted is not           unconstitutionally vague or overly broad. ....</b>	<b>9</b>
<b>II.   The trial court did not err in denying Colburn’s Motion           to Quash Indictment. ....</b>	<b>15</b>
<b>III.  There was sufficient evidence to support Colburn’s convictions. ....</b>	<b>17</b>
<b>IV.   The trial court did not err in denying Colburn’s expert testimony .....           and denying the admission of his last will and testament.</b>	<b>22</b>
<b>V.    The trial court erred by admitting into evidence a photograph of Ms. Hill. ....</b>	<b>23</b>
<b>CONCLUSION .....</b>	<b>25</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>26</b>

## TABLE OF AUTHORITIES

### Cases

<i>Bush v. State</i> , 895 So.2d 836 (Miss. 2005).	18
<i>Davis</i> , 485 So. 2d at 1058.	22
<i>Decker v. State</i> , 66 So.3d 654 (Miss. 2011).	11, 13
<i>Fulgham v. State</i> , 47 So.3d 698 (Miss. 2010).	10
<i>Galloway v. State</i> , 122 So.3d 614 (Miss. 2013).	22
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).	18
<i>Jerningham v. State</i> , 910 So.2d 748 (Miss. Ct. App. 2005).	18
<i>Jones v. City of Meridian</i> , 552 So.2d 820 (Miss. 1989).	10
<i>Jones v. State</i> , 710 So.2d 870 (Miss. 1998).	10
<i>Keller v. State</i> , 138 SO.3d 817 (Miss. 2014).	23
<i>Reining v. State</i> , 606 So.2d 1098 (Miss. 1992).	10
<i>Richmond v. City of Corinth</i> , 816 So.2d 373 (Miss. 2002).	10
<i>Sneed v. State</i> , 31 So.3d 33 (Miss. Ct. App. 2009).	18
<i>State v. Hoffman</i> , 508 So.2d 669 (Miss. 1987).	16
<i>Wash v. State</i> , 931 So.2d 672 (Miss. Ct. App. 2006).	18
<i>Waterman v. State</i> , 822 So. 2d 1030 (Miss. Ct. App. 2002).	22
<i>Westbrook v. State</i> , 953 So.2d 286 (Miss. Ct. App. 2007).	10
<i>Winters v. State</i> , 52 So.3d 1172 (Miss. 2010).	16

### Statutes

§43-47-5.	13
Miss. Code Ann. §43-47-5(i).	12, 21
Miss. Code Ann. §43-47-5(j).	13
Miss. Code Ann. §43-47-5(k).	13
Miss. Code Ann. §43-47-5(q).	18
Mississippi Code Annotated section 43-47-19.	passim

### Other Authorities

<i>Reforming Power of Attorney Law to Protect Alaskan Elders From Financial Exploitation</i> , 27 Alaska L. Rev. 1 (2010).	14
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**STATEMENT OF THE ISSUES**

- I. The statute under which Colburn was convicted is not unconstitutionally vague or overly broad.**
- II. The trial court did not err in denying Colburn's Motion to Quash Indictment.**
- III. There was sufficient evidence to support Colburn's convictions.**
- IV. The trial court did not err in denying Colburn's expert testimony and denying the admission of his last will and testament.**
- V. The trial court erred by admitting into evidence a photograph of Ms. Hill.**

**STATEMENT OF THE CASE**

This appeal by Gregory Wayne Colburn proceeds from the Circuit Court of Rankin County, Mississippi, with the Honorable William E. Chapman III, presiding. Colburn was indicted by a grand jury on December 19, 2013, on three counts of exploitation of a vulnerable adult. (C.P. 35). After a trial commencing on July 21, 2014, the jury returned a verdict of guilty against Colburn in Counts

I and II and found him to be not guilty of Count III. (C.P. 196-199).

On August 19, 2014, Colburn was sentenced to serve ten (10) years on Count I and ten (10) years on Count II, to run consecutively, in the custody of the Mississippi Department of Corrections. (C.P. 215-216). He was also order to pay restitution in the amount of \$78,000.00 for Count I and \$79,581.24 for Count II. (C.P. 216).

### **STATEMENT OF THE FACTS**

Ms. Ruby Hill worked as a school teacher for around forty years and lived frugally in order to save money for her retirement. (Tr. 598). She is in her late eighties, has no children and has no family living nearby. (Tr. 550). She met the defendant, Gregory Colburn, in 1990 when he was an insurance agent and sold her and her mother a small burial policy. (Tr. 423). Colburn would visit Ms. Hill and her mother two to three times a week, then more frequently after Ms. Hill's mother passed away. (Tr. 424). He began running errands for Ms. Hill and eventually she relied on him to "do everything for her," including drive her around to pay bills and to the grocery store. (Tr. 425-427). Colburn would drive her to her bank in Brookhaven and to check on her house located there. (Tr. 428). He said their relationship is that of a grandmother and grandson. (Tr. 434). In October of 2011, Ms. Hill injured herself in a bad fall in her home, and while she was hospitalized for her injuries, she signed a Durable Power of Attorney (POA) and a POA for Heath Care appointing Colburn as her agent. (S-14, D-1, D-2). According to Colburn, since October of 2011, he has ensured that all of her needs are met. (Tr. 434, 436).

In January of 2012, Ms. Hill was discharged from the hospital and transferred to Heritage House, an assisted living facility in Brandon, Mississippi, where she was still currently residing at the time of trial. (Tr. 148, 398, 213, S-14). Ms. Hill was diagnosed with dementia while she was hospitalized and when she transferred to Heritage House, Dr. Todd Perkins continued her treatment

as her primary physician. (Tr. 148). She took medication for her dementia and occasional anxiety. (Tr. 165, 166). Dr. Perkins stated she displayed symptoms of dementia, including impaired cognition and slow memory. (Tr. 151). In his opinion, she was not capable of taking care of her own finances because her mental capacity was impaired and she needed assistance with ambulating and getting to her appointments. (Tr. 151).

On November 15, 2012, Doug Winstead, a regional security officer at Trustmark National Bank, received a phone call from another department concerning a reclamation made on Ms. Hill's bank account. (Tr. 168). Colburn tried to deposit Ms. Hill's Social Security check, but it had been forged by someone, so Ms. Hill signed a affidavit of forgery on the check. (Tr. 185). The forgery complaint was lodged through the federal government, so Trustmark was not aware of the identity of the forger. (Tr. 185). The government sent a reclamation to the bank, notifying the bank of the forgery and charged the bank for the amount of the check. (Tr. 185). Trustmark, in turn, debited the amount of the check from Ms. Hill's account, with left her with a negative balance. (Tr. 186). The negative balance on Ms. Hill's account prompted Colburn to call Trustmark to complain. (Tr. 178, 186).

While investigating the history of Ms. Hill's account in reference to the reclamation, Winstead discovered what he noted as irregularities in her account. (Tr. 169). These irregularities were personal checks written on Ms. Hill's account to Colburn's account with Regions Bank. (TR. 169). Winstead reported the irregularities to the Attorney General's Office. (Tr. 170).

Following are the transactions involving Trustmark Bank:

Check 5852, dated May 14, 2012, for \$20,000.00 from Ms. Hill's Trustmark account, payable to Community Bank and signed "Ruby F. Hill" and "Gregory Colburn POA." The corresponding deposit slip shows the check was deposited into Colburn's personal account at Community Bank (account 1002978544). (Tr. 170-172, S-1).

Check 6024, dated April 10, 2012, for \$125,000.00 from Ms. Hill's Trustmark account, payable to Community Bank, memo "new checking acct."  
(Tr. 172-173, S-2).

Check 5918, dated February 15, 2012, for \$1,500.00 from Ms. Hill's Trustmark account, payable to Greg Colburn, memo "exp. reimbursement Oct. - Dec. '11." The back side states "for deposit only" and is stamped by Regions Bank.  
(Tr. 174, S-3).

Check 5841, dated March 27, 2012, for \$1,500.00 from Ms. Hill's Trustmark account, payable to Greg Colburn, memo "exp. Jan, Feb, March," and signed "Ruby F. Hill by Gregory Colburn POA 10/18/11." The corresponding deposit slip shows the deposit into a Community Bank account for Men of Music, LLC (account 28553) with Colburn's home address—101 Scottsdale Drive, Jackson, Mississippi—as the account address.  
(Tr. 175, S-4).

On April 10, 2012, Colburn and Ms. Hill opened a new joint checking account at Community Bank under both of their names (account 1000066140) with check 6024 for \$125,000 from Ms. Hill's Trustmark account. (Tr. 190, S-5). Following are transactions involving Community Bank:

On May 14, 2012, Colburn used \$75,000.00 from the new joint account at Community and purchased a Certificate of Deposit (CD) in his own name. As the sole owner of the CD, if Colburn died, the CD would be passed to his estate.  
(Tr. 191, 193, S-6).

Colburn signed check 1003, dated June 5, 2012, for \$1,500.00 from the joint account, payable to cash.  
(Tr. 193-194, S-7).

Colburn signed check 1012, dated August 21, 2012, for \$1,500.00 from the joint account, payable to cash, memo "June, July, August Reimbursement."  
(Tr. 195, S-8).

On February 22, 2012, Colburn deposited in to his personal Community Bank account (account 2978544) a check for \$3,440.00 from AXA Equitable Life Insurance Company, payable to Ms. Hill who endorsed it over to Colburn.  
(Tr. 196-197, S-9).

On May 10, 2012, Colburn deposited into his personal Community Bank account (account 2978544) a check for \$52,209.93.00 from Federated Gov Income Securities, payable to "Gregory Wayne Colburn POA/FBO Ruby Francis Hill," at Colburn's home address.

(Tr. 198-199, S-10).

On August 22, 2012, Colburn deposited into his personal Community Bank account (account 2978544) a check for \$3,931.31 from Bank of Forest, payable to Ms. Hill who endorsed over to Colburn.  
(Tr. 200, S-11).

The only identifiable deposits into Ms. Hill and Colburn's joint account at Community Bank were funds from Ms. Hill's account at Trustmark. (Tr. 201). Colburn did not make any deposits.

After Trustmark contacted the Vulnerable Adults Unit at the Attorney General's Office, Investigator Russell Frazier subpoenaed the Trustmark and Community bank records. (Tr. 211). On November 15, 2012, Frazier went to Heritage House to talk to Ms. Hill about the transactions at issue and to get a feel for her mental capacity. (Tr. 213-215). Ms. Hill informed Frazier that she did not have a joint account at Community Bank and she did not have any account with Colburn. (Tr. 216). Frazier presented her with several checks from Trustmark and she could not remember what the checks were for. (Tr. 217). Frazier looked at Ms. Hill's patient sheet and discovered she had a diagnosis of dementia. (Tr. 262). Dr. Perkins also informed Frazier that Ms. Hill had dementia. (Tr. 230). He only stayed for about ten minutes because he could tell she was "obviously demented." (Tr. 215).

On December 10, 2012, Frazier and Investigator Jamie Thompson met with Colburn regarding the curious transactions. (Tr. 218, 226). He explained the reason he and Ms. Hill opened a joint account at Community with \$125,000.00 from Ms. Hill's Trustmark account was because Trustmark had issues with his POA, so Ms. Hill wanted him to move her money to another bank and Colburn recommended Community. (Tr. 220). According to Doug Winstead, although Trustmark may recognize POAs, the Brookhaven branch manager was not comfortable with the POA Colburn presented. (Tr. 181-182). Colburn said Ms. Hill insisted on opening the new account as a joint



account with Colburn. (Tr. 220).

Colburn also told Frazier that he suggested to Ms. Hill she needed to move some money into a CD, she agreed, so he moved \$75,000.00 from the joint account into a CD. (Tr. 220). Frazier asked him why the CD was purchased solely in his name if the CD was to benefit Ms. Hill, and he responded that it must have been a mistake because the CD was supposed to be in both of their names. (Tr. 221). He admitted Ms. Hill was not present when the CD was purchased and she did not sign a signature card, but he said he would make sure her name was added. (Tr. 221). Frazier's investigation also revealed that shortly after Colburn purchased the CD, he used it as collateral for a \$60,000.00 loan. (Tr. 221).

Frazier asked Colburn if he had deposited any of Ms. Hill's money from her Trustmark account into his own personal account and he said he may have deposited a few hundred dollars into his account for running errands. (Tr. 222). After Frazier confronted him with the \$20,000.00 deposit from Ms. Hill's account into his personal account at Community, then he explained that it was what Ms. Hill wanted to do with the money. (Tr. 222).

Frazier asked Colburn about a \$15,000.00 Met Life Transaction. (Tr. 223). Originally, Colburn told Frazier the money was deposited into the joint account, but after Frazier confronted him with records that indicate the money went to Men of Music<sup>1</sup>, he changed again to say that is what Ms. Hill wanted to do with the money. (Tr. 223).

Regarding the \$3,440.00 AXA check, Colburn originally told Frazier it was deposited into her account (Frazier assumed he meant the joint account), however, when Frazier informed he had

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<sup>1</sup>

Men of Music was a southern gospel trio, which included Colburn, who traveled to sing at churches. (Tr.412). Colburn testified that he was only a volunteer and never received a paycheck.

proof the check was deposited into his personal account, he stated Ms. Hill wanted him to have the money as a gift. (Tr. 223).

Regarding the \$52,000.00 Federated Income Securities check, he originally stated he deposited the money into Ms. Hill's account, however, when Frazier told him the check had actually been deposited into Colburn's personal account, he explained it must have made a mistake. (Tr. 224). Frazier's investigation revealed that Colburn had bought a large tour bus for \$112,000.00 that same month, but Colburn denied he used the \$52,000.00 to buy the bus. (Tr. 224, S-13). After their meeting, Colburn reduced his statement to writing and signed it, with Frazier and Thompson as witnesses. (Tr. 225-226, S-14).

Colburn was later indicted by a grand jury on three counts of exploitation of a vulnerable adult. (C.P. 35-36). Count I alleges he exploited Ms. Hill by depositing checks made payable to her into his personal bank account at Community Bank (account 2978544). Count II says he exploited her by creating a joint account at Community Bank (account 1000066140) under his and Ms. Hill's names with her money and then used funds from that joint account for his own profit or advantage. Count III says he exploited her by depositing a check made payable to her and a check from her Trustmark account into a "Men of Music" account (account 28553).

At trial, Colburn testified in his own defense. He talked about his close relationship with Ms. Hill. (Tr. 436). He retired from work on disability in 2004 and owed \$18,000.00 in medical bills and he testified that Ms. Hill gave him cash for the entire debt. (Tr. 438-439). He testified she also gave him \$10,000.00 cash in 2008 for a deposit on a Volkswagen. (Tr. 439-440). On days he was going to travel to sing, he said she would tell him to come by and "inadvertently she would always have an envelope" with \$500.00 to \$1,000.00 to help with his travel expenses. (Tr. 440).

Colburn testified that everything he has done for Ms. Hill was with her verbal or written

consent. (Tr. 462). He said the check for \$20,000.00 was a gift from her. (Tr. 444-445, S-1). He testified that Trustmark Bank would not accept his POA over Ms. Hill, so on April 10, 2012, after taking her to the doctor, he asked her if she wanted to move her money to a different bank that day. (Tr. 445-446). He told her his Men of Music account is at Community Bank and she chose Community. (Tr. 446). He said she wrote and signed the \$125,000.00 check to open the joint account. (Tr. 446, S-2).

Colburn testified he spent about \$500.00 a month on his debit card for Ms. Hill's various expenses and he said check number 5918 for \$1,500.00 in February was to reimburse himself for October through December expenses in. (Tr. 446-447, S-3). He said she told him to always reimburse himself for money spent on her behalf. (Tr. 448). He said check number 1003 for \$1,500.00 in June was also for reimbursement for three months during that time and check number 1012 for \$1,500.00 in August was reimbursement for June, July and August. (Tr. 448-450, S-7, S-8).

Regarding the \$3,440.00 check to Ms. Hill from Axa Insurance, Colburn testified she endorsed the check over to him as a gift "because [he] did so much for her." (Tr. 450-451, S-9).

Colburn's testimony regarding the \$52,000.00 check from Federated Gov. Securities was that it was a stock account and she was concerned the market was going to crash, so she asked Colburn to look into closing out the account. (Tr. 452). They asked him for a copy of his POA and a POA registration form to close the account. (Tr. 452, D-4). When Colburn asked her what she wanted to do with the money, he testified she told him she wanted him to have it to use "for the ministry because y'all have got to have a new vehicle to travel in." (Tr. 452). He said he deposited the \$52,000.00 in his Community Bank account that used strictly as a holding account for Men of Music's special projects funds. (Tr. 452-453). A witness from Men of Music testified that \$50,000.00 towards the purchase of their tour bus came from Ms. Hill. (Tr. 418). He said he advised Colburn

against accepting the money, but Colburn insisted it was what she wanted. (Tr. 419).

Colburn said Ms. Hill wanted him to close out her Bank of Forest CD using his POA, which the bank allowed, and he picked up her \$3,931.31 check and he testified that she endorsed it over to him as a gift. (Tr. 454, S-11). He deposited the money into his personal account the next day. (S-11).

Colburn testified that he thought the \$75,000.00 CD in his name was a joint CD because he purchased it with funds from the joint account.(Tr. 456, S-6). He testified that he has not spent any money from the joint account, other than the \$75,000.00. (Tr. 457). Colburn also testified he asked Ms. Hill if he could use the CD as collateral for the balance of the loan on the Men of Music tour bus after she provided the \$50,000.00 down payment for it and she consented. (Tr. 457-458). He said he did not look at the paperwork when he obtained the loan, so he did not notice the CD was in his name. (Tr.474).

Colburn testified he began noticing "bad days" with her mental capacity at the end of 2013. (Tr. 443). He said no one told him she had dementia. (Tr. 470).

## **ARGUMENT**

### **I. The statute under which Colburn was convicted is not unconstitutionally vague or overly broad.**

Colburn argues on appeal that the statute under which he was convicted is “unconstitutionally vague, ambiguous and broadly over-reaching.” (Brief For the Appellant p. 8). The Mississippi Supreme Court has set forth the well-settled standard for determining the constitutionality of a statute as follows:

A party challenging the constitutionality of a statute must prove his case by showing the unconstitutionality of the statute beyond a reasonable doubt. This Court will strike down a statute on constitutional grounds only where it appears beyond all reasonable doubt that such statute violates the constitution. . . . All doubts must be

resolved in favor of the validity of the statute. If possible, courts should construe statutes so as to render them constitutional rather than unconstitutional if the statute under attack does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity.

*Richmond v. City of Corinth*, 816 So.2d 373, 375 (Miss. 2002) (quoting *Jones v. State*, 710 So.2d 870, 877 (Miss. 1998) (internal citations omitted)). A criminal statute must be strictly construed in favor of the accused, but “strict construction means reasonable construction.” *Id.* (quoting *Reining v. State*, 606 So.2d 1098, 1103 (Miss. 1992)).

A statute is void for vagueness if “individuals of common intelligence must necessarily guess at the meaning and differ as to its application.” *Id.* (quoting *Jones v. City of Meridian*, 552 So.2d 820, 824 (Miss. 1989)). The criminal statute must define the offense with sufficient definiteness “in a manner that does not encourage arbitrary and discriminatory enforcement.” *Fulgham v. State*, 47 So.3d 698, 701 (Miss. 2010) (citation omitted). “Ambiguity is a term of statutory interpretation.” *Westbrook v. State*, 953 So.2d 286, 289 (Miss. Ct. App. 2007). When a statute is not ambiguous, the principles of statutory interpretation do not apply and the court must apply the statute’s plain meaning. *Id.*

A statute is void as overly broad if it is “fairly capable of being utilized to regulate, burden, or punish constitutionally-protected speech or conduct.” *Richmond* 816 So.2d at 379. The legislature may not prohibit conduct “with an overly broad statute that invades the area of protected freedoms.” *Westbrook* at 289.

Colburn was indicted and convicted on two counts of exploitation of a vulnerable adult, in violation of Mississippi Code Annotated section 43-47-19, which states, in part:

(1) It shall be unlawful for any person to abuse, neglect or exploit any vulnerable person.

Miss. Code Ann. §43-47-19 (Rev. 2012). The term “exploitation” is defined by §43-47-5(i) as “the

illegal or improper use of a vulnerable person or his resources for another's profit, advantage or unjust enrichment, with or without the consent of the vulnerable person, and may include actions taken pursuant to a power of attorney.”

In his argument on the statute's unconstitutionality, Colburn specifically takes issue with the meaning of “vulnerable person” and the term “improper use” in the context of exploiting a vulnerable adult.

**A. “Vulnerable person”**

“Vulnerable person” is defined by §43-47-5(q), as follows:

[A] person, whether a minor or adult, whose ability to perform the normal activities of daily living or to provide for his or her own care or protection from abuse, neglect, exploitation or improper sexual contact is impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging. The term ‘vulnerable person’ also includes all residents or patients, regardless of age, in a care facility.

Colburn cites to the Mississippi Supreme Court case, *Decker v. State*, 66 So.3d 654 (Miss. 2011), for this Court's discussion of the exploitation statute at issue. In *Decker*, this Court noted that the statutory definition of “vulnerable person” does not require the person to have a mental impairment to qualify. *Decker* at 658. “Indeed, the statute's broad definition of a vulnerable adult includes a person with completely normal mental capacity, but whose ability to perform the normal activities of daily living is impaired because of a physical limitation, such as blindness or the inability to walk.” *Id.*

Colburn argues that the Court in *Decker* stated it is “‘troubled by the statute's broad reach’ in defining who is vulnerable . . . ” (Brief For the Appellant p. 9). The Court does not state the definition of a “vulnerable person” is *overly* broad in a constitutional context on its own. The State submits the Court was not troubled by the statute's broad reach *in defining who is a vulnerable*

*person*, as Colburn argues, only by its broad reach in its application as a whole.

Colburn points out that the definition of vulnerable person “does not eliminate any one being treated for conditions, ailments, impairments, or any other circumstances that may have absolutely nothing to do with mental awareness, capacity or competency.” (Brief For the Appellant p. 9). The State agrees— the statute does not eliminate people based solely on the fact that their impairment may have absolutely nothing to do with mental abilities. The statute’s broad definition of “vulnerable person” ensures that people whose abilities are equally impaired by causes other than just mental impairments are included in the protected category of people. A person with a physical or emotional disability may be as vulnerable to abuse, neglect and exploit as a person with a mental impairment.

A broad definition of a vulnerable person alone does not render §43-47-19 unconstitutionally overbroad in its application. The determination of whether a person qualifies for the protection of the statute is only a threshold consideration. The element of exploitation, which contains its own required sub-elements, effectively limit the reach of the statute to protect innocent conduct. In the case at bar, Ms. Hill was a resident in a care facility at the time Colburn made the transactions, so she qualifies for protection as a vulnerable adult. Dr. Todd Perkins also testified that, as of January 2012, she had a diagnosis of dementia and, in his opinion, she was not able to care for herself or her finances. (Tr. 151). So, she is also a vulnerable adult because her dementia impairs her ability to perform normal activities of daily living, such as getting around without assistance, talking to her doctor, and remembering important facts about her own financial affairs.

#### **B. “Improper use”**

Colburn was convicted of exploiting Ms. Hill, a vulnerable person. As stated above, “exploitation” is the illegal or improper use of a vulnerable person’s resources for another’s profit, advantage or unjust enrichment. Miss. Code Ann. §43-47-5(i). “Illegal use” is any action defined by

Mississippi law as a criminal act. Miss. Code Ann. §43-47-5(j).

The definition of “improper use” is as follows:

[A]ny use without the consent of the vulnerable person, any use with the consent of the vulnerable person if the consent is obtained by undue means, or any use that deprives the vulnerable person of his ability to obtain essential services or a lifestyle to which the vulnerable person has become accustomed and could have otherwise afforded.

Miss. Code Ann. §43-47-5(k)(Rev. 2012)<sup>2</sup>. Colburn argues that element “improper use” does not have a “defined objective meaning,” however, “improper use” is explicitly defined in the statute in a manner that is not subject to more than one meaning. There are four instances when the use of a vulnerable person’s resources is considered improper pursuant to the statute and those four ways are unambiguous. Colburn claims the term “improper” is a “relationship based word in any context” and whether conduct is proper or improper is subjective. (Brief For the Appellant p. 10). Whether conduct is improper may in fact be subjective in many other contexts, but in the context of the Vulnerable Adults Act, it is unambiguously defined.

The definition of “improper use” gives adequate notice as to what actions are considered an improper use of a vulnerable adult’s resources. If a person uses the resources of a vulnerable adult without their consent for another’s profit, advantage or unjust enrichment, that use is improper. If a person uses the resources of a vulnerable adult with their consent if that consent was obtained by undue means, then that use is also improper. And if a person uses the resources of a vulnerable adult in a way that deprives them of their ability to obtain essential services or the lifestyle they have

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<sup>2</sup>

This Court noted in *Decker v. State*, “improper use” was not defined within the vulnerable adult statutes and its omission created an overly broad statutory reach which prohibited *any* use of a vulnerable adult’s money for personal benefit, even if used with consent. *Decker*, 66 So.3d at 658. However, subsequent to *Decker*, the Legislature amended §43-47-5 to include the definition of “improper use” quoted here.



grown accustomed, then that use is also improper. Ordinary people of common intelligence can easily determine what conduct is considered improper and they do not have to guess at its meaning.

Colburn points out that the statute does not require one to have knowledge of the relationship of the parties involved. (Brief For the Appellant p. 11). He also claims the State did not put on any witnesses to the personal relationship between Colburn and Ms. Hill and did not refute their relationship. (Brief For the Appellant p. 12). Knowledge of a relationship between the parties is not relevant to the determination of whether one person exploited the other. A close relationship, such as between Colburn and Ms. Hill, does not make it any more or less likely that vulnerable person was exploited. In fact, it is often the case that a close personal relationship is the weapon that actually enables the exploitation of the vulnerable person.

Colburn argues that his actions were proven to be proper because of his Power of Attorney over Ms. Hill and that the unconstitutional overbreadth of the statute allowed for the criminalization of his actions. (Brief For the Appellant p. 13). His actions were not proven to be proper. One having a power of attorney over a vulnerable person does not disqualify the accused's action from scrutiny under the statute. In fact, the definition of exploitation specifically states the use of resources may include actions taken pursuant to a POA. If the illegal or improper use of the vulnerable person's resources at issue otherwise falls within the definition of exploitation, the fact that they have a POA does not shield them from criminal liability. Indeed, a vulnerable adult "often transfers property to an account shared with the perpetrator, who may use the account for her own purposes." *Reforming Power of Attorney Law to Protect Alaskan Elders From Financial Exploitation*, 27 Alaska L. Rev. 1 (2010). "The POA is one of the tools used by those who prey on the elderly, as the document enables a perpetrator to commit crimes under what appears to be the elder's consent." *Id.*

If the actions taken pursuant to a POA were with the consent of the vulnerable person, but

the consent was obtained by undue means, the actions are improper and might be considered exploitation, despite the POA and despite the consent. If one takes action pursuant to a valid POA for the profit, advantage or unjust enrichment of another, but without consent, then those actions are improper. In Colburn's case, even if he were legally authorized by the POA to take every action at issue as he claims, if the jury did not believe Colburn that Ms. Hill really consented to his use of her resources for his own profit, advantage or unjust enrichment, then his actions were improper and he exploited Ms. Hill in violation of §43-47-19. If the jury believed he obtained consent from Ms. Hill, his actions pursuant to the POA would have been proper, even if took those actions for his own profit or advantage.

The definition of "improper use" cures the issue of the statute's overbreadth so that constitutionally protected conduct is not punished. Colburn argues the statute has the potential to criminalize common and accepted practices, "such a spouse giving permission to withdraw money to buy a birthday present or even giving a child . . . permission to withdraw money for college tuition." (Brief For the Appellant p. 9). In those scenarios, the permission to withdraw the money would have to have been obtained by undue means to violate the statute, or the spouse or child's use of the money would have to deprive the vulnerable adult of their ability to obtain essential services or their accustomed lifestyle.

For all these reasons, Mississippi Code Annotated §43-47-19 is constitutionally sound Colburn failed to carry his burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague and overly broadand this issue is without merit.

## **II. The trial court did not err in denying Colburn's Motion to Quash Indictment.**

Colburn next argues that the trial court erred in denying his Motion to Quash Indictment

because the indictment failed to provide a concise statement of the crime, which denied him of a reasonable opportunity to prepare and present a defense. (Brief For the Appellant p. 16). He maintains that his use of Ms. Hill's money was not illegal because the transactions were made with Ms. Hill's consent, and as such, the indictment failed to charge him with an indictable offense.

The issue of whether an indictment is sufficient to notify the accused of the charges against him is a question of law and the standard of review is de novo. *Winters v. State*, 52 So.3d 1172, 1174 (Miss. 2010). Generally, the indictment should contain a "plain, concise and definite written statement of the essential facts constituting the offense charged" and should "fully notify the defendant of the nature and cause of the accusations against him." *Id.* (quoting URCCC 7.06; *State v. Hoffman*, 508 So.2d 669, 671 (Miss. 1987)). If the indictment tracks the language of the statute under which it is drawn, it is considered sufficient. *Id.*

Colburn's indictment specifically references Miss. Code Ann. §43-47-19 in its title which prohibits the exploitation of a vulnerable adult. (C.P. 11-12). Each count of the indictment tracks the language of the criminal statute, and includes the essential elements of exploitation of the vulnerable adult by illegal or improper use of her resources for his own profit or advantage, with or without her consent, and including acts committed pursuant to a power of attorney.

The indictment adequately describes and notifies Colburn of the nature and cause of the charges against him. Count I states he exploited Ms. Hill "by depositing checks made payable to Ruby Hill into his personal Community Bank account (# 2978544) in violation of M.C.A. Section 43-47-19 of 1972, as amended[.]" Count II states he exploited her "by creating a Community Bank account (#1000066140) in the name of 'Ruby Francis Hill or Gregory Wayne Colburn,' and then transferring funds belonging to Ruby Hill into the account, and using these funds for his own profit or advantage[.]" Count III charges he exploited her "by depositing a check made payable to Ruby

Hill and a check from Ruby Hill's Trustmark bank account (#4904522173) into a 'Men of Music' bank account (#1000028553)[.]"

Colburn argues the indictment criminalizes legal acts based on the fact that the indictment contains the language "with or without the consent of Ruby Hill," and the statute also allows for consent to be given, therefore, he says the grand jury still could have indicted him for every act alleged, even if they found Ms. Hill gave her consent without undue influence, which is legal. He is overlooking the language "did exploit" and by "illegal or improper use" of her resources. Every act still must be illegal or improper, which does not allow for a scenario where Ms. Hill gives her consent without that consent being obtained by undue means.

Colburn asserts the indictment against him failed to provide a concise statement of the crime, denying him a reasonable opportunity to prepare and present a defense, because his actions are not illegal. (Brief For the Appellant p. 16). Exploiting a vulnerable adult is indeed an illegal act. The indictment notifies him in a plain, clear and concise manner that the State of Mississippi is accusing him of committing that illegal act, and includes the essential facts the State believes constitute the nature and cause of that illegal act. The indictment is sufficient. Accordingly, the trial court properly denied his Motion to Quash Indictment.

### **III. There was sufficient evidence to support Colburn's convictions.**

Colburn claims that the evidence presented at trial was not sufficient to support his convictions, and therefore, the trial court erred by not granting his motion for directed verdict or motion for JNOV. (Brief For the Appellant p. 18, 21). He asserts the jury's verdict was against the overwhelming weight of the evidence.

In determining whether the State presented legally sufficient evidence to support a jury's verdict, the reviewing court does not "ask itself whether it believes that the evidence at the trial

established guilty beyond a reasonable doubt.” *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). Rather, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Id.* Additionally, under this inquiry, “all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence.” *Wash v. State*, 931 So.2d 672, 673 (Miss. Ct. App. 2006).

“[W]hen determining whether a guilty verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the trial court has abused its discretion in failing to grant a new trial, and the Court finds the verdict is against the overwhelming weight of the evidence so that allowing the verdict to stand would sanction an unconscionable injustice.” *Jerningham v. State*, 910 So.2d 748, 751 (Miss. Ct. App. 2005) (citation omitted). “Any factual disputes are properly resolved by the jury and do not mandate a new trial.” *Sneed v. State*, 31 So.3d 33, 43 (Miss. Ct. App. 2009).

Colburn was convicted of two counts of exploitation of a vulnerable adult, in violation of Miss. Code Ann. §43-47-19. (C.P. 196). The State offered sufficient proof on each element of the offense to convict him and the jury’s verdict was not against the overwhelming weight of the evidence. First, the definition of “vulnerable person” includes all residents, regardless of age, in a care facility. Miss. Code Ann. §43-47-5(q). During the relevant dates in the indictment, Ms. Hill was a resident at Heritage House, an assisted living facility, so she is a vulnerable person according to the statute.

Also, evidence was presented that Ms. Hill was a vulnerable adult due to her mental and physical impairments as well. Dr. Perkins testified that Ms. Hill had dementia and, in his opinion,

her dementia impaired her ability to perform her normal activities of daily living, such as taking care of her own finances, and it effected her memory and cognitive function. (Tr. 151). Investigator Russell Frazier also testified that in his short meeting with Ms. Hill, he could tell she was “obviously demented” and she could not remember important facts about her financial affairs. (Tr. 215, 217). She was wheelchair bound and could not ambulate without assistance from others and she depended on Colburn to drive her everywhere. Colburn testified that she relied on him to do everything for her, including taking her to the bank and grocery store and taking her to pay her bills. (Tr. 427). When she fell and had no one to help get up for days, he found her and took her to the hospital. (Tr. 432-433).

Evidence favorable to the guilty verdict demonstrates that Colburn exploited Ms. Hill through the improper use of her resources for his own profit or advantage. There was no dispute regarding whether or not Colburn conducted the transactions at issue. Colburn testified that Ms. Hill gave him \$18,000.00 cash to pay his medical bills in 2004 and \$10,000.00 cash for a down payment on a Volkswagon in 2008. There was also testimony that Colburn deposited Ms. Hill’s \$15,000.00 Met Life check into his Men of Music account. He originally said he deposited it into their joint account, but then when confronted with the documents, he changed his story and said Ms. Hill wanted to give it to him as a gift. Most importantly, when Ms. Hill was in the hospital in October of 2011, she executed a Durable POA appointing Colburn as her agent.

Ms. Hill moved to Heritage House in January of 2012 and, shortly thereafter, Colburn began using her money. On February 15, 2012, he deposited a \$1,500.00 check from Ms. Hill’s account into his personal Regions account claiming the money was reimbursement for October through December expenses he paid. On February 22, 2012, Colburn deposited Ms. Hill’s AXA insurance check into his personal Community account. He initially told investigators that he deposited the check into her account, but when they confronted him with the documents, he changed his story and

said she wanted him to have the money. The following month, March of 2012, he deposited another \$1,500.00 check from her account into his Men of Music account. He signed the check himself as her POA and said it was for January through March expenses.

About two weeks later, on April 10, 2012, Colburn took Ms. Hill to Community and she wrote a \$125,000.00 check from her Trustmark account to open a joint account in both of their names. He said she wanted to move banks from Trustmark because they had issues with Colburn's POA, so he told her his Men of Music's account is at Community Bank, so she chose Community. He did not tell her he had personal account at Community Bank, he said his personal account was at Regions.

On May 10, 2012, he deposited a \$52,000.00 check from Federated Securities as Ms. Hill's POA into his personal Community account. He originally told investigators he deposited it into her account, but when they showed him it was deposited into his personal account, he said it must be a mistake. That same month, Colburn bought a large \$112,000 tour bus with a \$50,000.00 down payment that a Men of Music witness testified came from Ms. Hill. Colburn denied the \$50,000 was the Federated Securities check. For the \$60,000.00 remaining balance on the bus loan, he used the CD in his name purchased with Ms. Hill's money as collateral.

On May 14, 2012, very shortly after Ms. Hill opened the joint account, Colburn made two large transfers of her money in one day. First, he wrote a \$20,000.00 check from her Trustmark account, signed it as her POA and deposited the money into his personal account at Community Bank. He initially lied to investigators and said he had only ever taken a few hundred dollars from Ms. Hill's Trustmark account, but when investigators confronted him with proof of the \$20,000.00 deposit, he changed his story and said that Ms. Hill wanted him to have the money. Next, Colburn withdrew \$75,000.00 from the newly opened joint account and used it to purchase a CD in his own

name. He said he thought it was a joint CD and that it must have been a mistake. He admitted Ms. Hill wasn't present when he purchased the CD and he said he would make sure her name was added.

In June of 2012, he signed a \$1,500.00 check from the joint account, payable to cash. He testified the check was for reimbursement for the current three month's expenses, however, the \$1,500.00 check he wrote on August 21, 2012, from the joint account, payable to cash, stated it was for June through August expenses. The next day, August 22, 2012, Colburn deposited into his personal account a \$3,931.31 Bank of Forest check payable to Ms. Hill. He testified that Ms. Hill gave him the check as a gift.

There is ample evidence to show that Colburn used Ms. Hill's money for his own profit or advantage. Once Ms. Hill was transferred from the hospital to Heritage House, in six months, Colburn had taken \$170,000.00 of Ms. Hill's money for his own benefit.

Colburn's primary argument on appeal is that all of the money he took from Ms. Hill was done pursuant to a valid POA and based on their close personal relationship. The fact that Colburn had a POA does not necessarily shield him from criminal liability here because the statute expressly states that the use of resources may include actions taken pursuant to a POA. Miss. Code Ann. §43-47-5(i). So, in order to be considered exploitation, the his use of her money must be an "improper use," as discussed in the first issue on appeal, in one of the statutorily enumerated ways.

The jury instructions contained the statutory language regarding "improper use," so the jury was entitled to convict Colburn if it found that he improperly used Ms. Hill's resources for his own profit or advantage without her consent, or with her consent if the consent was obtained by undue mean, or any use that deprives her of her ability to obtain essential functions or a lifestyle to which she has become accustomed and could otherwise have afforded.

The jury's duty is to decide the credibility of the evidence and the witness's testimony.



“Mississippi has a long standing policy of trusting the jury’s verdict.” *Waterman v. State*, 822 So. 2d 1030, 1033 (Miss. Ct. App. 2002). The jury functions “to determine the facts from the evidence presented and to draw all reasonable inferences from the facts.” *Davis*, 485 So. 2d at 1058. There was sufficient evidence for the jury to find that Colburn’s testimony was not credible and that Ms. Hill did not actually consent to his use of her funds in the egregious way he did. While Colburn may have acted pursuant to the broad authority granted by his POA, his actions were so egregiously self-serving that it would be hard to believe Ms. Hill consented his use of such a large amount of her money for his own profit.

When viewing the evidence in a light favorable to the verdict, the evidence was sufficient to support his convictions. And to the extent a weight of the evidence argument was raised, the evidence supports the finding that Colburn exploited Ms. Hill, such that to allow the jury’s verdict to stand would not sanction unconscionable injustice.

**IV. The trial court did not err in denying Colburn’s expert testimony and denying the admission of his last will and testament.**

Colburn argues the trial court erred by denying his expert testimony and admission of Ms. Hill’s will. Colburn attempted to offer testimony from a handwriting expert, Dr. Richard A. Roper, regarding Ms. Hill’s signature on the Last Will and Testament, for which Colburn was the sole beneficiary. (D-5). The admission of expert testimony is within the discretion of the trial court. *Galloway v. State*, 122 So.3d 614 (Miss. 2013). Expert testimony is admissible if it is reliable and relevant. *Id.* at 632. If the testimony will assist the trier of fact in determining a fact issue, the testimony is reliable. *Id.*

Colburn sought to admit the Last Will and Testament and the testimony of the handwriting expert to prove the signature on the will was Ms. Hill’s in order to show the close, loving

relationship between her and Colburn. (Tr. 74). The trial court ruled the evidence was not relevant to the issue of whether Colburn exploited Ms. Hill before she passed away and also felt the evidence would be confusing the jury. (Tr. 77). The trial court did not abuse its discretion in denying the expert's testimony and the admission of the will because the relationship between Colburn and Ms. Hill is not relevant to the issue of whether he exploited her. The fact of their close relationship would not help the jury in determining any element of the crime or defense to this crime and could possibly confuse the jury regarding the issues. Furthermore, the fact that Ms. Hill's will leaves everything to Colburn does not have any bearing on whether he can take all of her property while she is alive. Colburn exploited Ms. Hill because of, or despite, their close relationship and this issue has no merit.

Ms. Hill's resources for his own profit or advantage without her consent, or with her consent if the consent was obtained by undue mean, or any use that deprives her of her ability to obtain essential functions or a lifestyle to which she has become accustomed and could otherwise have afforded.

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**V. The trial court erred by admitting into evidence a photograph of Ms. Hill.**

Colburn argues the trial court erred in admitting a photograph of Ms. Hill because he says the photo is grossly prejudicial in nature because she is in a wheelchair. (Brief For the Appellant p. 23). Admissibility of photographs is within the sound discretion of the trial court. *Keller v. State*, 138 SO.3d 817, 857 (Miss. 2014). Photographs of a victim have evidentiary value when they supplement or clarify witness testimony. *Id.*

The trial court did not abuse its discretion in allowing the photograph of Ms. Hill. (Tr. 85). The photograph is not grossly prejudicial, as Colburn claims. The fact that Ms. Hill is in a wheelchair should be of no surprise to the jury who has heard testimony from several people stating Ms. Hill had troubling walking and getting around.

## **CONCLUSION**

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm Gregory Colburn's conviction and sentence.

Respectfully submitted,  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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This the 5th day of November, 2015.

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